

*Laws* **2015**, *4*, 755–770; doi:10.3390/laws4040755

OPEN ACCESS

*laws*

ISSN 2075-471X

[www.mdpi.com/journal/laws/](http://www.mdpi.com/journal/laws/)

*Article*

## Embryonic Human Life and Dignity: The French Connection

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Academic Editor: Aurora Plomer

*Received: 30 September 2015 / Accepted: 3 December 2015 / Published: 7 December 2015*

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**Abstract:** Human dignity is considered by a number of commentators as a normative concept that could potentially bridge the gap between bioethics and human rights. The purpose of this article is to question this assumption insofar as it applies to embryonic human life by way of a case study. The article will chart the way dignity has been historically used in French political and legal debates since the 1990s to attempt to afford constitutional protection to human embryos. It then proposes an interpretation of why such attempts failed, which could have wider significance for current debates.

**Keywords:** human dignity; bioethics; human embryos; value of human life; Dworkin; Waldron

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### 1. Introduction

What are the appropriate legal limits on the kinds of interventions that take human embryos as their objects? Many commentators insist that these and related questions can be productively explored by reference to the concept of human dignity [1,2]. Their arguments usually take a multiplicity of forms. For the purposes of the present article, some of these can be usefully traced back to three quite general assumptions. First, as a matter of positive law, human dignity is explicitly mentioned in a number of international treaties and other instruments, as well as by a growing number of national constitutions [3]. Moreover, even when not explicitly mentioned, it has been interpretively ‘inferred’ by some constitutional courts, thus acquiring the status of a constitutional norm or principle [4]. This entails, commentators claim, that national and international adjudicative institutions, amongst which figure supreme and constitutional courts and human rights courts holding various powers of judicial and constitutional

review, may use the legal concept of human dignity in order to give shape to the normative constraints under which other political actors, and first and foremost legislatures, should operate [3].

The second category of claims is to the effect that human dignity, properly interpreted, could eventually bridge the putative divide between human rights and bioethics, since it is capable of applying to any kind of human entity, regardless of whether its bearer is a 'person' or not [5,6]. For this reason, human dignity could turn out to be particularly useful when it comes to specifically protecting human embryos. Very roughly, the argument commonly used to this end usually takes the following form. In order to ascribe human rights to an entity, that entity must somehow be classified as a 'person', whatever the proper criteria of 'personhood' turn out to be. However, human embryos appear as unlikely candidates for human rights protection in the above sense, at least in politics characterized by widespread and reasonable disagreement about conceptions of the good and the ultimate meaning and value of human life. In these politics, there seems to be a deep and pervasive divide on the question whether human embryos can be properly classified as 'persons'. There thus seems to exist a range of bioethical issues that are not helpfully broached by the concept of human rights. Accordingly, some commentators suggest that human dignity could provide an argumentative way out of the conundrum: regardless of whether embryos could be classified as 'persons' possessing human rights or not, they should at the very least be understood as having human dignity by sheer virtue of their humanity. Correspondingly, they suggest, all parties to the debate could reasonably accept such a position, without having to come to a further and unlikely agreement on whether embryos are really 'persons' and, hence, bearers of human rights, or not [7].

Third, it is maintained that the importance of the concept of human dignity does not just derive from the fact that it is formally enshrined in international instruments and national constitutions. Dignity should be understood as being more than just an international or constitutional norm: it is often presented as a 'matricial norm', at the very foundation of post-World War II constitutionalism [3,4,6]. By solemnly expressing a vigorous preference for a form of legal humanism, the concept of dignity should thus be considered as a fundamental value or principle, which trumps other kinds of, especially utilitarian or more broadly consequentialist, considerations [6].

Taken together, these three argumentative strands appear to provide a powerful normative basis for the protection of human embryos. Since dignity is a fundamental value or principle that applies to every human entity regardless of its 'personhood' and insofar as dignity is either explicitly mentioned in texts that are part of higher law or can be easily inferred otherwise, it is the judge's task to apply it in order to review legislative or other measures that have an impact on the treatment of human embryos. The upshot would be that judges should use dignity to justify limits on political decisions to do with the treatment of human embryos [5,6,8].

In this article, my aim is to critically explore the extent to which the concept of human dignity can indeed play the normative role sketched above. Instead of attacking the question head-on, I shall attempt to cast some doubt on its cogency by way of examining a particular case study. To this end, I shall begin by charting the debate on human embryos and their constitutionally-protected dignity in France since the 1990s and until the latest amendment to the legislative framework, which took place in 2013. My focus shall be on the ways the dignity argument was used before French constitutional judges and by its reception by these judges themselves. After surveying the various attempts made to afford protection to human embryos by using the human dignity argument and recording their failure, I

shall propose two interpretations of these failures. My suggestion is that the proposed interpretations should not be understood as confined to the French case: they could potentially be of wider significance, both in relation to legal debates about human embryos in constitutional democracies characterized by pervasive, deep and reasonable disagreement about the value of human life and, more generally, with regard to the role of the concept of human dignity in bioethical contexts.

## 2. Charting the History of the Legal Framework on Human Embryos in France

The starting point for any kind of systematic reflection on the ways in which French legal thought has broached the question of the embryo and its dignity is, without any doubt, the passing of the first statutes on bioethics in 1994. It was at that moment that three major laws were adopted, which introduced for the first time the term ‘embryo’ into French law [9–11]. The laws were designed to provide a more or less comprehensive normative framework to do with issues relating to the regulation of bioethics. The first 1994 law [9] was to do with the management of personal data acquired from persons participating in biomedical research. The second law [10] aimed at promoting ‘respect of the human body’. It contained, for the most part, legislative provisions expressing the main principles and rules that would guide decision-making in a variety of areas of bioethical interest. Remarkably, the law created a new title within the Napoleonic Civil code, which enshrined the twin principles of ‘dignity of the person’ and of ‘respect owed to the human being from the beginning of its life’, without though explicitly affirming that either of them would apply to the human embryo. Moreover, the law set out legal rules aiming at protecting the human body, and it banned a number of controversial practices, most famously surrogate motherhood. Finally, the third law [11] was more technical. It introduced a number of provisions aiming at concrete implementation of the principles set out in the second law. It also set out precise rules to do with the regulation of medically-assisted reproduction, as well as with issues, such as organ retrieval and transplants or the means of genetic identification of persons. Last, the law contained a number of provisions to do with embryos *in vitro*. To begin with, it explicitly banned embryo research and the creation of human embryos for research purposes, confining the latter to procreative purposes. The creation of embryos was thus predicated on the ‘parental project’ of an infertile couple. Crucially, the law allowed for the donation of unused embryos from an infertile couple to another, and exceptionally, it made possible the conduct of ‘studies’ on spare embryos, defined as research that does not harm them. It also made provision for the destruction of so-called ‘supernumerary’ (*i.e.*, spare) embryos, which would not be subsequently used in IVF cycles, if these were created until its promulgation date, were cryopreserved for at least five years and could not be donated to another couple <sup>1</sup>.

As transpires from the debates that took place in Parliament prior to the passing of the 1994 laws [7], the question of the status of the human embryo *in vitro* was at the forefront of political confrontation. Should it be treated, juridically speaking, as a ‘person’ or as a ‘mere thing’? Such was the harsh dilemma that most academics working in the doctrinal field of ‘*droit civil*’ (private law) had attempted to address at least since the beginning of the 1980s, when the practical problem of the most accurate legal description (‘*qualification juridique*’) of embryos used in IVF erupted on the French legal scene. Those authors had been at the forefront of the construction of a robust and influential doctrinal

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<sup>1</sup> Article 9 of Law No. 94–654 [11].

discourse that depended on a single premise: from the point of view of private law, the embryo is either a ‘person’ or a ‘thing’ and *tertium non datur*. Accordingly, and up to the adoption of the 1994 bioethics laws, private law was the main doctrinal battlefield between proponents and critics of IVF techniques. Moreover, arguments to this effect were also used during the debates that preceded the adoption of the 1994 laws [7].

Whatever the legal merit of those arguments, however, their chances of political success proved to be severely limited. The view that ultimately prevailed in Parliament was that, for the purposes of effectively regulating assisted reproduction, it was not necessary to provide a clear answer to that question [12]. Consequently, from the point of view of the contribution of the 1994 bioethics laws to the legal status of the embryo in France, there are three key features that stand out. First, French lawmakers avoided classifying the human embryo as either a ‘person’ or a ‘thing’, thus refraining from directly resolving a heated doctrinal dispute that was raging within legal academia ever since assisted procreation techniques gave the possibility of creating human embryos outside the human body [7]. Second, they accordingly abstained from explicitly stating that embryos *in vitro* were bearers of dignity, leaving this question open for the Constitutional council, France’s constitutional court (henceforth ‘Council’), to decide [7]. Third, the laws nonetheless seemed to institute two quite different categories of human embryos *in vitro*, depending on whether it was possible to inscribe the embryos’ existence within a ‘parental project’ or not. On the one hand, embryos that would be used in IVF cycles, either by the couple from whom they had been created for or by another couple to which they could be donated, were protected by a variety of detailed provisions. On the other hand, embryos that would not so be used and fulfilled certain other conditions were to be immediately destroyed [12].

This last provision of the third 1994 law proved to be particularly controversial, since it made mandatory the destruction of embryonic human life. Immediately after the bills were voted in Parliament, a number of parliamentarians brought two ‘*saisines*’ (referrals) before the Council, challenging the bills’ constitutionality on various grounds [13]. In relation to the decision to destroy spare embryos, the parliamentarians’ complaint alleged, first, that such a decision impinged on the embryos’ constitutionally-protected right to life. The complaint further invoked the constitutionally-protected principle of equality, urging that the different treatment introduced by the bill between embryos created before and after the date of promulgation of the laws was arbitrary. Finally, the complaint also stressed that allowing research on supernumerary embryos, and despite the fact that, as already observed, the bills specified that such research would be lawful only if it did not harm the embryos, was contrary to the principle of respect for the integrity of the person and of the human body.

The Council dismissed the parliamentarians’ complaints by a reasoning that amounted to a real *tour de force* [13]. Outlining this reasoning is crucial for the purposes of evaluating the rhetorical efficiency of constitutional claims to the effect that embryos should be protected *qua* bearers of human dignity. To begin with, the Council ‘interpretively inferred’ that human dignity was indeed a constitutional principle, and this despite the fact that dignity is nowhere explicitly mentioned in the French 1958 Constitution nor in the rest of the constitutional texts that form the basis of what is commonly called ‘the constitutionality bloc’ (*i.e.*, the normative texts that are higher law). According to the Council, the principle of human dignity could be inferred from various textual homes. These consisted of different passages of the Preamble to the 1946 Constitution, which mentioned the ‘sacred and inalienable rights’ equally possessed by all human beings and the victory of the anti-fascist alliance in World War II.

Indeed, the wording chosen by the Council loosely follows that of the provisions of the 1946 Preamble. Explicit reference is made to dignity *qua* safeguard ‘against all forms of enslavement and degradation’. This is what the Council said:

[t]he preamble to the 1946 Constitution reaffirmed and proclaimed rights, freedoms and constitutional principles, declaring...“In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights”; it follows that the protection of the dignity of the human person against all forms of enslavement or degradation is a principle of constitutional status ([13], para. 2).

The next question that the Council had to answer was whether and how the principle of dignity applied to human embryos. Indeed, many commentators had suggested that the concept of dignity should apply to all biologically-human entities irrespective of whether they can be classified as ‘persons’ [5,8]. On the face of it though, and *pace* these commentators, the Council refused to afford protection to human embryos by virtue of the principle of dignity [7]. In fact, the Council stressed that Parliament is constitutionally free to adopt a hierarchy of forms of protection of different kinds of human life. Thus, it noted that, when it comes to protecting prenatal human life, the constitutional principle of human dignity is implemented by the principle of respect owed to every human being from the beginning of its life. This latter principle was first invoked in the Council’s 1975 abortion decision [14], in which the Council had acknowledged that the principle applies to embryos *in vivo* and that it is outweighed, in the specific circumstances defined by the legislator in the abortion bill, by the liberty of the pregnant woman. In relation, however, to embryos *in vitro*, the Council stressed that Parliament was constitutionally free to decide that the principle of respect for human life, as well as the principle of equality do not apply. In so doing, the Council interpreted the text of the bioethics bills and attributed to Parliament an intention to the effect that embryos *in vitro* were not protected by the principle of respect owed to every human being since the beginning of its life, since some of them had to be destroyed. The crucial consideration was that this legislative choice passed constitutional muster. Here is what the Council said:

The legislator [...] did not consider that the preservation of all embryos already created had to be assured in all circumstances, and for an unlimited amount of time; he estimated that the principle of respect owed to every human being from the beginning of its life did not apply to these embryos; therefore [the legislator] necessarily considered that the principle of equality was not applicable either ([13], para. 9).

Now, there are many ways to try to make interpretive sense of the Council’s 1994 ruling. A major difficulty consists of the fact that, due to the particular style of justification of judicial decisions akin to the French legal system, no explicit definition of human dignity was provided. Accordingly, every interpretation of the Council’s jurisprudence is to a certain extent underdetermined [7]. However, one reasonable way of achieving a coherent interpretation of the Council’s decision is by assuming that the Council accepted the existence of a hierarchy of constitutional requirements relating to the protection of human life [15]. These depended, first, on whether human life develops within or outside the human

body and, second, on whether it can be considered as part of a 'parental project'. On this reading, embryos *in vitro* are placed at the bottom of the constitutional ladder. Neither the principle of respect due to every human being from the beginning of life, nor the principle of equality are applicable to them. Outside of a 'parental project', these embryos are simply bare life, whose only possible destiny is a form of sacrifice. Consequently, they can be permissibly destroyed. In contrast, the Council accepts that the principle of respect owed to the life of human beings from the beginning of life extends to embryos *in vivo*. Still, this principle may, under specified circumstances, be outweighed by the liberty of the pregnant woman to choose an abortion, as the 1975 decision of the Constitutional council made abundantly clear. Last, human beings already born seem to be the only kinds of entities to which the principles of human dignity and equality fully apply. Birth thus seems to mark the bright line of the attribution of full constitutional status. The Council thus appears to have rejected the application of the principle of human dignity to bare embryonic life. Moreover, even in cases in which human dignity was thought to apply to embryos and fetuses *in vivo* through the principle of respect for human life, the Council identified a hierarchy of differentiated normative outcomes.

The next occasion on which the Council had the opportunity to rule on the application of the principle of human dignity to human life before birth was in 2001 [16]. This time, however, and unlike its 1994 decision, the crucial issue was to do with whether the principle of human dignity applied to embryos and fetuses *in vivo* and was such as to justify a stricter interpretation of the constitutional conditions under which abortion is allowed. The Constitutional council was thus called upon to decide on the issue of the constitutionality of a bill significantly liberalizing the regulatory regime of abortions for reasons of 'distress' of the pregnant woman. Among other things, the 2001 bill extended the period during which those kinds of abortions could be legally authorized from ten to twelve weeks. This provoked a complaint raised by some parliamentarians to the effect that the extension of the period amounted to a constitutionally-suspect treatment of human life *in vivo*, since it concerned the destruction of 'a human being that had acceded to the stage of a fetus.' Their claim was that the transition from the embryonic to the foetal stage of development is a constitutionally-sufficient consideration to curtail the liberty of the pregnant woman.

The Council did not accept this argument. It ruled that the extension of the period during which abortion is permissible from ten to twelve weeks did not 'ruin the equilibrium' that is to be sought between the principle of the dignity of the human person and the liberty of the pregnant woman, protected by Article 2 of the 1789 Declaration of the Rights of Man and of the Citizen. In so doing, the Council invoked the principle of human dignity to characterize the protection accorded by the constitution to prenatal human life *in vivo*. It then proceeded to balance this principle against the liberty of the pregnant woman, concluding that abortion on demand during the first twelve weeks of pregnancy is constitutionally permissible. The upshot was that human dignity before birth was not to be understood as an absolute value: it could be balanced against other constitutionally-protected values and, eventually, yield to them [17].

The third and final jurisprudential episode took place in 2013. In a sense, that was the moment when major ambiguities left open by the Council's previous jurisprudence on the constitutional status of human embryos *in vitro* were ultimately resolved. As already observed, the preceding analysis of the Council's 1994 ruling should not be understood as automatically implying that under French constitutional law, Parliament had *carte blanche* to decide on the fate of embryos *in vitro* in a kind of constitutional

void. In fact, different readings of this ruling were possible. Under a restrictive reading, all that the Council had said in its 1994 decision was that the level of protection afforded by bioethics laws to embryos *in vitro* was sufficient to pass the constitutional challenge [7,15]. Recall, at this point, that the 1994 bioethics laws had regulated assisted reproduction by means of a mixed restrictive and permissive framework, which protected embryos *in vitro* through a series of criminal sanctions, while, at the same time, allowing for embryos to be stored, donated and sometimes destroyed. The laws clearly stated that research involving the destruction of embryos is prohibited, and they banned the creation of embryos for research and commercial purposes [11]. Thus, it could be reasonably argued that the Council had ruled in favour of the constitutionality of the 1994 laws because of the presence of these various guarantees [5]. Hence, under a restrictive interpretation, which was in fact adopted by some commentators [5,8], all that the 1994 ruling had really established was that the particular choices made by Parliament could pass the constitutionality test, not that all and any choices whatsoever would also pass it. In particular, it remained unclear whether the Council would also accept a more openly liberal approach to embryo experimentation, which was the main political issue to have dominated the bioethics agenda in the early 2000s.

Indeed, when the issue of the potential uses of human embryonic stem cells (hESC) rose to prominence, a major shift in attitudes occurred [12]. A number of political actors began to question the sustainability of the restrictive 1994 legal framework in the midst of concerns about both the therapeutic promises held by hESC and the international competitiveness of French research in the domain of biomedicine. The major legal issue was to do with the fact that the generation of hESC lines necessitated the destruction of human embryos. Moreover, there was wide agreement that the 1994 laws banned the practice of generating hESC lines through embryo destruction on French soil. Two steps were taken to address these issues. First, the French Minister of Research authorized in 2002 the importation of two hESC lines from Australia by the National Center for Scientific Research. While a pro-life group challenged the legality of this authorization, the courts made clear that the ban on embryo research should be interpreted in a restricted way: it was not applicable to the importation of hESC, because already generated hESC were not 'embryos' within the meaning of the 1994 laws [12].

The second step was more radical. It consisted of amending the prohibitive legal framework itself. In this vein, amendments to the 1994 laws were passed in 2004 [12], legalizing certain forms of embryo research and, consequently, allowing for the destruction of human embryos for a limited number of research purposes. It is important to stress, though, that the formulation of the relevant provisions retained the wording of the 1994 ban on embryo research [12]. Embryo research was allowed as an exception to this ban and only if a list of substantive and procedural conditions was satisfied. The conditions proved to be rather stringent. On the one hand, a research unit had to apply for authorization to a regulator, named 'Agence de Biomédecine' (ABM), under a special procedure that comprised subsequent monitoring of the implementation of the research protocol. On the other hand, the 2004 amendments introduced a number of particularly important substantive conditions. To begin with, embryo research could only be conducted on spare embryos. Second, such research was to be authorized if (1) it could lead to major therapeutic progress; and (2) there was no alternative research method of comparative efficiency [12].

The problem was that a strict interpretation of the comparative efficiency condition, coupled with the generously-construed rules of standing for judicial review, could provide pro-life groups opposing

embryo research with the opportunity to challenge the legality of authorizations issued by ABM. The risk was a concomitant chilling effect on French biomedical research, since it could prove extraordinarily difficult to argue convincingly before a court that there was no method other than research on hESC that could guarantee a given therapeutic result. This is exactly how things unfolded. The tipping point came with a decision by the Paris Administrative Court of Appeal in 2012 [18], which quashed an authorization granted by ABM to INSERM ('Institut National de la Santé et de la Recherche Médicale'), on the grounds that the comparable efficiency condition was not satisfied *in concreto*. This provoked a rapid political backlash amidst concerns about the loss of international competitiveness on the part of French biomedical researchers, which resulted in the passing of an important pro-research amendment in 2013 [19]. The amendment not only softened up the necessity condition on embryo research, but also led to a complete reversal of the logic of the relatively conservative 2004 law. Thus, instead of an in-principle prohibition of embryo research accompanied by the possibility of exceptions under strict conditions, the whole system moved towards an in-principle liberalization of embryo research under softer conditions [20]. To begin with, the requirement of 'major therapeutic progress' set out in the 2004 law was replaced by a less strict, and more vague, 'medical' finality. Likewise, the requirement to prove that there is no alternative method of comparative research efficiency was replaced by a looser condition to the effect that the proposed research necessitates the use of embryos. Still, despite the relative liberalization of the legal regime, the 2013 bill, like its 2004 counterpart, did not allow for the creation of embryos *in vitro* solely for the purposes of research. Hence, only spare embryos could be used for research purposes, with the written consent of the couple whose genetic material was at the embryos' origin [19,20].

Nonetheless, the decision to swiftly modify the balance of the legal framework provoked political tension. It thus came as no surprise that the 2013 bill was challenged before the Council by a significant number of parliamentarians on the grounds, *inter alia*, that it allegedly violated the principle of human dignity and the concomitant principles of the respect due to human life from its beginning, the principle of the inviolability of human life, as well as that of the integrity of the human species [21]. In a landmark ruling, the Constitutional Council decided that, taking into due account the conditions accompanying embryo research set out in the bill, the challenged provisions did not violate the principle of human dignity<sup>2</sup>. The Council thus made clear for the first time that the destruction of human embryos for research purposes, at least under the conditions set out in the 2013 law, does not amount to a violation of the principle of human dignity. In so doing, the Council corroborated the hierarchical interpretation of its initial 1994 ruling, which distinguished among different constitutional forms of protection of human life, allowing for the sacrifice of the bare life of embryos outside a 'parental project' and arguing for the compatibility of this kind of sacrifice with the principle of human dignity [15]. The upshot was clear: whether as the necessary by-products of assisted reproduction or as objects of potentially destructive medical research, human embryos were not protected by a robust version of the human dignity principle.

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<sup>2</sup> See Thought 17 of the ruling.



### 3. Exploring the Failure of the Dignity Argument to Protect Embryonic Human Life

Contrary to what some commentators had originally hoped [5,6,8], the principle of human dignity was not used by the Council to legitimize curtailing the progressive liberalization of the legal framework on embryo research. In particular, it appears that the Council was not convinced that human dignity could bridge the normative gap between human rights, ascribable to ‘persons’, and merely biologically-human entities. Instead, as already observed, the Council’s jurisprudence can be understood as depending on deep asymmetries built into the very concept of human dignity itself: human dignity would entail different kinds of constitutional protection depending on whether it applies to human entities *in vitro*, *in vivo* or after birth [15]. How can such a failure to persuade the Council to apply dignity in an egalitarian way to every human entity be explained? Was it just a matter of the Council’s not living up to the normative standards implied by the concept of human dignity, simply misapplying it in the cases presented before it, or, rather, some other explanation is available that could eventually throw light on the dignity’s very structure? Moreover, was the political and legal failure of the dignity argument just a French peculiarity, or perhaps wider lessons can be drawn from this case study? In what follows, I shall attempt to connect the developments in France with wider debates on dignity and the value of human life, by proposing two kinds of complementary explanations. The first one is to do with the argumentative constraints imposed on actors in the context of political debates akin to pluralistic democracies characterized by disagreement about the impersonal or ‘detached’ value of human life. France, it is suggested, can be seen as a particularly salient example of such a polity, but the conclusions can potentially generalize to other similar polities. The second is to do with further elaborating on one way of understanding the structure of the concept of human dignity, which has been recently put forward by Jeremy Waldron [22] and James Q. Whitman [23,24].

#### 3.1. *Dignity, Reasonable Value Pluralism and the Detached Value of Human Life*

Recall, for a moment, the specifically political problem about the status of human embryos that the concept of dignity was supposed to help resolve, according to a number of influential commentators. These commentators had acknowledged that the question of the legal classification of the embryo in terms of the ‘person’/‘thing’ dichotomy was intractable [5,6,8]. In the face of pervasive and reasonable disagreement on whether the concept of ‘personhood’, whatever its correct criteria of application turn out to be, picks out human embryos (or foetuses), a number of authors had thus suggested discarding the ‘person’/‘thing’ framework and resolving the dispute by using the concept of human dignity. The main idea was that all biologically-human entities have dignity, irrespective of whether they are ‘persons’ or not. Accordingly, they maintained, all parties to the debate could accept the dignity argument, regardless of their specific views on the ‘personhood’ question. Therefore, dignity would apply to human embryos by virtue of the fact that they are inherently human and independently of whether they can be thought to be ‘persons’ (potential or otherwise) [5,6,8]. A close look at parliamentary debates that preceded the adoption of the 1994 bioethics laws lends support to the efficacy of this argumentative strategy [7]. Indeed, a majority of parliamentarians rejected arguments to the effect that embryos should be treated as ‘persons’, but thought, nonetheless, that embryos should not be treated as ‘things’ either. They agreed, in other words, that the life of the embryos has a special kind of value that can justify restrictions on

embryo research notwithstanding the fact that it could be the case that embryos were not ‘persons’. To use Luc Boltanski’s terms [25], the exchange of arguments had driven a process whereby critique of already held positions led parties to a ‘rise in generality’ through the use of more abstract arguments and concepts, which could eventually secure agreement. In this vein, dignity equipped parties with such an abstract plateau of agreement. Moreover, the Council later accepted, albeit not in an entirely clear way, dignity’s *prima facie* applicability to human embryos [21].

Still, the French example aptly shows that abstract agreement comes at the price of pervasive indeterminacy. Even if we agree that dignity reflects a kind of overlapping consensus on the part of political actors that hold different viewpoints, ideologies and conceptions of the value of human life, it is still the case that a wide range of disagreement will subsist when it comes to deciding how to concretely apply dignity to a variety of cases. It is at this point that consensus typically breaks down [15]. Due to the indeterminacy of the concept of dignity, it is open to a variety of actors to frame their conflicting ideological projects and political requests by using the abstract language of dignity. Indeed, the exact normative content of human dignity and its scope of application remain unclear in French law. As already suggested, no explicit definition of human dignity has yet been provided by French Supreme and Constitutional courts. Moreover, the Council has not taken sides on the question whether human dignity is a fundamental background value/principle, or just a fundamental right, or both. As a result, judges have invoked dignity in many different contexts that do not seem to lend themselves easily to a coherent overall normative approach. These do not comprise just the bioethics cases already mentioned. They also include social rights, where dignity has been used to justify the ‘constitutional objective’ of providing for decent housing [15], as well as the enactment of rules pertaining to criminal enquiries [15]. To add to the complexity, the French Supreme Administrative Court ruled in the famous dwarf-tossing case that dignity is a component of the notion of ‘*ordre public*’ (public policy), thus granting a mayor the power to prohibit a game of dwarf-tossing, and despite the fact that the tossed dwarf himself complained that his dignity was being violated by the prohibition of the game, since he had freely chosen to take part in it [12,15].

How does this kind of indeterminacy play out in contexts in which the abstract concept of dignity informs decision-making pertaining to the creation and use of human embryos for a variety of purposes? One way to broach this issue is by paying heed to Ronald Dworkin’s crucial distinction between two radically different ways of attributing value to human life, introduced in his important work about abortion and euthanasia [26]. Dworkin dubs the first way the ‘derivative’ view. Under such a view, human life has value insofar as it is the life of a person with interests and rights. A derivative attribution of value to the life of an entity is thus, roughly, an attribution of value that depends on the ‘personhood’ of that entity. The second way is very different; Dworkin calls it the ‘detached’ view. Under such a view, human life has value merely because it is biologically human, and independently of whether it is the life of a person that lives this life ‘from within’, as it were. The value attributed is thus detached from the human entity’s interests and rights: it is an impersonal kind of value that abstracts from the entity’s ‘personhood’ (whatever ‘personhood’ might turn out to be). It is the value that human life has *qua* human life *simpliciter*. Dworkin’s distinction between detached and derivative views thus also allows an understanding of dignity in impersonal terms, which transcend the ‘person’/‘thing’ distinction. In particular, dignity can be interpreted as an attribution of detached value to the life of human embryos [7]. In this vein, embryos would possess dignity merely by virtue of the fact that they are

biologically human. This fact would be in itself a sufficient ground for the possession of a special kind of value, quite independently of whether they can also be understood as ‘persons’ or not.

Appeals to detached conceptions of the value of embryonic human life in the above sense, however, are hardly the end of the story. Dworkin contends that genuine disagreements about issues to do with abortion are so intractable precisely because of the complexity of the structure of normative convictions about the best way to interpret the detached value of human life [26]. Moreover, he also maintains that, insofar as these convictions rest on opinions to do with the ultimate meaning and value of human life, they are essentially religious [26]. Using more conventional terminology, we can say that they are to do with the sanctity of human life. Dworkin then argues that, at least in polities governed by a roughly liberal conception of legitimacy, such as France, disagreements about religious convictions should be resolved by reference to a principle of state neutrality [26]. Additionally, while state neutrality can be interpreted in a number of quite different ways, it would be safe to assume that it entails at its bare normative core the idea that state coercion should not be used in ways that reflect a state choice involving taking sides in an essentially religious disagreement. Transposed to the embryo debate, this reasoning suggests that the state is not justified in using state coercion in ways that reflect a partisan interpretation of the embryo’s dignity (*i.e.*, its detached value). If such a reading is plausible, then dignity’s indeterminacy with regard to the regulation of embryo research can be understood as having deeper roots: it would flow from the essentially religious character of debates about the embryo’s detached value. Likewise, opposition to the cogency of the dignity argument or reluctance to use it in the embryo debate would reflect a normative stance in favour of an ideal of state neutrality. The Council’s jurisprudence can be understood as an expression of such reluctance [7]. Moreover, Dworkin’s argument generalizes in a straightforward way to all roughly liberal polities.

Now, Dworkin’s point is a normative one, but the argument from value pluralism in a liberal polity can be also recast in explanatory terms. The main idea would be the following. In polities that are characterized by pervasive and deep evaluative disagreement, such as France, successful collective action sometimes presupposes the use of public argumentation that can pass a test of wide acceptability. The secular structure of the public space in France [27], along with a robust conception of state neutrality in religious matters since at least the beginning of the 20th century [27] are the cornerstones of a political culture that undermines the political success of discourses that can appear as overtly partisan. To these considerations should be added the crucial role of path dependence. The study of parliamentary debates before the passing of the 1994 bioethics laws reveals a concern on the part of pro-life parliamentarians to use the dignity argument in order to justify the protection of embryonic human life without appearing as threatening the well-established 1975 abortion law [7]. This double argumentative bind, however, placed them in an awkward position: on the one hand, they had to accept that human life can be justifiably sacrificed, while, on the other hand, they also had to argue that it should be protected. As expected, their argumentative way out consisted of attempting to distinguish among different varieties of circumstances, depending on the embryo’s placement inside or outside the woman’s body and claiming that, in relation to the protection of embryos *in vitro*, no sense could be made of the requirement to balance the value of the life of the embryo with the woman’s procreative liberty [7]. However, the instability of their position, together with the fact that this position appeared to many to be overtly partisan, ultimately lent less plausibility to their argumentation. Therefore, there is a clear sense in which the Council’s jurisprudence about dignity simply codifies the orthodox

understanding of the structure of the public space in France. Additionally, it seems plausible to form the hypothesis that polities with analogously secular public spaces will constrain attempts to use dignitarian arguments to protect embryonic human life in roughly similar ways.

### 3.2. *Dignity-As-Rank and Bare Embryonic Human Life*

Granting that disagreement about the detached value of human life in the wider context of democratic pluralism constrains the ways in which dignitarian arguments in favour of the protection of embryonic human life can be legitimately used, could there also be an explanation more internal to the very structure of the concept of human dignity that potentially explains the line the Council took? In this last section, I shall explore an interpretive possibility that suggests a close link between recent renderings of the structure of the concept of human dignity, put forward by Jeremy Waldron [22] and James Q. Whitman [23,24], and the Council's jurisprudence on embryonic human life. If I am right, there is an inherent conceptual difficulty in extending the protection afforded by dignity to the bare human life of embryos, which the Council did not find the means to overcome.

Before we proceed further though, some stage-setting is in order. In a number of important publications, both Waldron and Whitman have put forward the thesis that a particularly productive way of approaching the modern concept of human dignity is by understanding it as the evolutionary product of medieval hierarchical understandings of *dignitas*. In contrast to authors that simply equate dignity with autonomy and ultimately with the form that national and international human rights protection took post-World War II [1], Waldron and Whitman suggest that a fruitful starting point for further enquiry is provided by the medieval conception of dignity as the expression of high social rank. The medieval conception of *dignitas*, Waldron and Whitman maintain, was to do with the privileges and forms of deference one was owed by virtue of the social rank or office one occupied within a formally hierarchical society [22–24]. Modern dignity, of course, is not aristocratic, but egalitarian. Accordingly, Waldron and Whitman claim democratic equality transformed dignity by bringing all bearers of dignity, as it were, on an equally high rank [22–24]. Thus, instead of applying only to a select aristocracy in the context of a hierarchical social structure, justified by a correspondingly hierarchical world view, modern dignity is the result of a 'leveling up process' through which humans acquire an equal, high status solely by virtue of their common humanity. Dignity retains its medieval conceptual connection with high rank, but in modern times, this high rank becomes the egalitarian and universal rank of humanity. In this vein, human dignity can be understood as grounding forms of deference and respect owed to one merely because one occupies on an equal footing with others the high office of humanity, so to speak. In other words, we get the specifically modern concept of human dignity once *dignitas*, formerly confined to aristocrats, undergoes an 'egalitarian transvaluation' [22].

How plausible is the Waldron-Whitman reading of human dignity as an egalitarian transvaluation of *dignitas*? This is a difficult question, and there is no space to explore it here. Suffice it to say that, as Stéphanie Henneville-Vaucher observes, such a reading at least appears to cohere with a number of judicial applications of the legal concept of human dignity in various jurisdictions [12]. This is especially noticeable with regard to a number of prominent judicial applications of the concept of dignity. Just like medieval *dignitas* was the source of social norms that could justify various constraints on the ways individuals possessing a certain kind of social or professional status implying *dignitas* presented

themselves in public or behaved towards others, dignitarian jurisprudence has been famously used to ground obligations that one has toward oneself. Famous dignitarian cases, such as the dwarf-tossing case, mentioned above, or the German peep-show case [12,28], can thus be interpreted as flowing from an understanding of dignity based on a conception of the duties stemming from the occupancy of the inalienable office of humanity. In these cases, the autonomy of individuals is curtailed on the grounds that they are degrading a humanity that transcends them and that defines a number of ways in which they ought objectively to behave. Hennette-Vauchez remarks that such specifically dignitarian jurisprudence seems to be based on a distinction between, on the one hand, the inalienable dignity that an individual has by virtue of her or his abstract humanity and, on the other hand, her or his individual self [12]. In this respect, dignitarian jurisprudence appears to echo themes explored by Ernst Kantorowicz's famous analysis of the King's two bodies in medieval England [4]. Kantorowicz had convincingly shown in his work that the doctrine of *dignitas* was used to justify a redoubling of the King's entity. On the one hand, the King's first body was his concrete physical embodiment, subject to decay, disease and eventually death. On the other hand, the doctrine of *dignitas* insisted that the King also had an immaterial and immortal body, which corresponded to his office conceived of as an abstraction [4]. In an analogous manner, modern human dignity can be understood as active occupancy of the inalienable and abstract office of humanity, which grounds a number of duties one has towards one's abstract humanity. Dignitarian jurisprudence thus lends some *prima facie* plausibility to the dignity-as-rank reading. It also makes clear that attempts to interpret the legal concept of human dignity as equal, high rank by virtue of occupancy of the office of humanity risk the danger of sacrificing the liberty and autonomy of the particular individual occupying this high role [12].

However, and quite apart from such risks, what is interesting for the purposes of the present article is that, insofar as they are conceived of in terms of duties associated with rank, modern dignity, as well as its medieval counterpart, they appear to be essentially aesthetic concepts. Either as grounds of deferential forms of behaviour on the part of others due to the occupancy of high rank or as grounds of duties to oneself in the pursuit of self-glorification and honour, dignity-as-rank is to do, as Waldron aptly puts it, with a 'moral orthopedics'. Indeed, Waldron duly notes the link with forms of self-control and self-presentation when he discusses dignity in relation to the wrongness of torture [22,29]. Part of the harm of torture stems from the fact that torture destroys the ability of persons to appear to others and to themselves in a dignified way. Proper self-presentation in a common space is thus an important part of the idea of moral orthopaedics inherent in a rank-based conception of modern human dignity. Moreover, arguably aesthetic ideas about proper ways of treating oneself as the bearer of abstract humanity also inform parts of the dignitarian jurisprudence, especially insofar as this jurisprudence is centred on the avoidance of 'degrading' forms of life.

However, if dignity-as-rank is to be interpreted by reference to aesthetic ideas about the moral orthopaedics corresponding to the occupancy of the office of humanity, then it is not at all clear how the bare biological human life of embryos could fit its interpretive picture. The aesthetic interpretation of dignity suggests that human dignity is not just about the moral status of bare biological humanity, but rather, about an abstract idea of the proper forms of life that correspond to the office of humanity, as well as about the forms of deference that represent the right kind of response to that humanity on the part of others. If this is right, then occupancy of the office of humanity presupposes that the occupant is recognizably human in an aesthetic sense: that she or he is able, at the very least, to present herself

or himself to others as a properly-behaving human being in a common shared space. However, the bare human life of embryos *in vitro* is anything but recognizably human: human embryos *in vitro* do not have a life in the sense of a recognizably-human life-form linked to a biography or some other controlling narrative. Instead, they are bare human life completely devoid of any kind of apparent link with the office of humanity aesthetically conceived. Note, moreover, that it is an open question whether there are other forms of human life that are unable to conform to the abstractly-defined moral orthopaedics of equal rank, such as infants or those with senile dementia. While it is not the aim of the present article to explore such wider implications of the aesthetic reading of dignity-as-rank, it appears initially plausible to suggest that a relevantly similar aesthetic idea could be behind demands to afford people the opportunity to ‘die with dignity’.

On the assumption that the concept of human dignity at least in part reflects this aesthetic dimension, it should come as no surprise that the Council found no violation of the principle of human dignity either in 1994 or in its more recent 2013 decision. Indeed, one could go even further and suggest that the legal structure of the 1994 bioethics laws in fact properly reflects a hierarchical understanding of human dignity, in the precise sense that the sacrifice of the bare life of merely biologically-human entities is the condition of the glorification of the equal high rank of all other occupants of the office of humanity. Egalitarian transvaluation of high rank would thus depend on there being entities below that rank, to which the office of humanity can be contrasted, just as *dignitas* was predicated on a hierarchy of social roles. If high rank is relational, then the entities excluded of it are the conditions of possibility of its occupancy by the entities included. On this reading, the fact that the Council simultaneously glorified the dignity of the human person and decided that the principle of equality does not apply to human embryos would just be a manifestation of the deeper conceptual logic of dignity-as-rank. One would also be tempted to say that, within this kind of legal arrangement, the bare human life of embryos *in vitro* is rendered sacred, not in the sense in which Ronald Dworkin used the term in *Life's Dominion* [26], to wit, as entities whose life has detached value, but in the more archaic and ambiguous sense that had already been explored by Emile Benveniste: as a sacrifice that cuts embryos off from the world of the living by putting them to death [30].

#### 4. Conclusions

The concept of human dignity has come under much attention and intense scrutiny as of late. A number of commentators have suggested that it could play a potentially useful role in bridging the gap between a traditional conception of human rights and bioethics. The article attempted to cast some doubt on such views, insofar as they purport to apply to embryonic human life. The article's aim was modest. My intention was not to make general claims about the concept of dignity and its relation to embryonic human life, but to suggest the potential pertinence for extant understandings of dignity of debates that took place in France from the 1990s onwards. These debates are characterized by the systematic failures of the uses of the dignity argument in favour of striking down provisions regulating the use of human embryos. Taking my cue from previous work with Aurora Plomer [15], I thus further elaborated on the claim that the dignity argument seems to function in an asymmetrical way before and after birth. I also suggested two potential explanations of the systematic failures of dignity arguments in such contexts. The first is to do with normative and empirical constraints on publicly-acceptable

arguments in pluralistic public spaces, and the second is to do with the conceptual structure of dignity-as-rank. Assuming the cogency of the proposed explanations, further research and more case studies are needed to show whether the lessons learned from the French embryo debates could have potentially wider significance.

### Acknowledgments

I wish to thank two anonymous reviewers for their helpful suggestions, Aurora Plomer for her encouragement and extensive discussions on the concept of dignity throughout the years, as well as the participants of the closed workshop on bioethics held in Sheffield in 15 May 2015.

### Conflicts of Interest

The author declares no conflict of interest.

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